Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

GANY MIKE BELLO,

Petitioner,

vs.

UNIVERSITY OF DAYTON SCHOOL OF LAW AND LORI SHAW,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

GANY MIKE BELLO
(Pro-se Petitioner)
4200 S. Hulen, Suite 600
Fort Worth, TX 76109
Tel: (817) 732-4858

57 pp

QUESTIONS PRESENTED

1. Under 28 U.S.C. § 455 does a Magistrate judge violate Judicial Impartiality, appearance of bias and judicial integrity when he presided and rendered decisions on a case while he was working as an employee of a Respondent and, a colleague of another and without disclosing these facts to the Petitioner?

2. Whether relief under 28 U.S.C. § 455(a) or § 455(b)(4), as in this case, should be vacatur of decisions rendered by the disqualified judge and a new trial ordered, or the tainted decisions could be purified by subsequent judges adopting it and relying on it without violating Due Process?

3. Whether Due Process requires a federally funded institution prior to "taking" a graded and earned passing grade under actual or pretext of enforcement of a state bar accreditation attendance policy of 15% class session absence limit, a hearing be given to determine the number of classes missed and what number constitutes 15%. Where this enforcement of punishment taking away property interest already earned was only enforced against blacks as opposed to whites similarly situated was 42 U.S.C. § 1981 and or 42 U.S.C. § 1983 violated?

LIST OF ALL PARTIES

All parties appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition are as follows:

PETITIONER (PRO-SE)

GANY MIKE BELLO
4200 S. HULEN
SUITE 600
FORT WORTH, TEXAS 76109

RESPONDENTS

UNIVERSITY OF DAYTON SCHOOL OF LAW
300 COLLEGE PARK
DAYTON, OHIO 45420

PROFESSOR LORI SHAW
300 COLLEGE PARK
DAYTON, OHIO 45420

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit, sitting in Ohio appears at Appendix A, to the Petition and has been designated as not recommended for Full Text Publication.

The opinion of the United States District Court appears at Appendix B to the petition and is not reported.

JURISDICTION

The date on which the United States Court of Appeals decided my case was June 17, 1999,

A timely petition for rehearing was denied by the United States Court of Appeals on September 7, 1999. And a copy of the order denying rehearing appears at Appendix D.

The Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment

- No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger: nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be against himself, nor be deprived of life, liberty, or property, without due process of law: nor shall private property be taken for public use, without just compensation.

The Fourteenth Amendment Sec. 1

- All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of the law: nor deny to any person within its jurisdiction the equal protection of the laws. . . . .

- *Section 5.* The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

28 U.S.C. § 455 provides in pertinent part:

> (a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances.

1. Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceedings.

* * *

4. He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or is a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

5. He or his spouse or a person within the third degree of relationship to either of them, or the spouse of such a person;

FEDERAL CIVIL RIGHTS STATUTES

42 U.S.C. § 1981 Equal rights under the law Provdes:

(a) All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and to no other.

(b) **"Make and enforce contracts" defined**

For purposes of this section, the term, "make and enforce contracts includes the making, performance, modification and termination of contracts and the enjoyment of all benefits, privileges, term, and conditions of the contractual relationship.

(c) **Protection against impairment**

The rights protected by this section, are protected against impairment by nongovernmental discrimination and impairment under color of State law.

42 U.S.C. § 1983 Civil action for deprivation of rights

(a) Every person who, under color of any statute, ordinance, regulation, custom or usage of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress. . . . .

STATEMENT OF THE CASE

Petitioner-Plaintiff was a law student at the University of Dayton School of Law (UDSL) between the fall of 1996 and fall of 1998, during which he completed his law degree. However Respondents have refused to issue his degree demanding that he pay for, and retake the class in

question again having paid for it already, taken it and passed it. He filed this lawsuit Pro-Se on April 9, 1997 (App. 30), with a sworn affidavit requesting preliminary and permanent injunction against Respondents-Defendants, UDSL, and Professor Lori Shaw (Shaw).

He pleaded to the court to restrain Shaw from grading his final papers in Legal Pro II class. And to enjoin UDSL from taking his earned passing grade in Legal Pro II class taught by Shaw. Where Respondent was attempting to give him a "F" or "Zero" instead of his earned passing grade of C or 6.0 GP. Claiming that their action was mandated by state bar accreditation and ABA rule on absences over 15% of class sessions. (App. 34).

Petitioner alleged that the Respondents have not provided him any hearing as provided in the school rules and as required by the law under due process: that Shaw intentionally set out to negatively impact his legal career goal because of his freedom of expression; that Shaw was determined to make him an example for other minorities and that he had not missed 15% of class session; that the enforcement of such punishment or regulation will diminish his standing, thereby negatively impacting his right to contract and that Shaw and UDSL have not punished any white student similarly situated as Petitioner, who is black. Plaintiff alleged his claims under the due process, equal protection, breach of duty, fraudulent misrepresentation as well as claims under 42 U.S.C. § 1981 and § 1983. (App. 30-36).

Shortly after the suit was filed, Judge Herbert Rice, the chief district judge, disqualified himself for conflict of interest, and referred the case to Judge Dlott. (Doc. 4). Not long after, magistrate Judge Michael Merz called to schedule discovery and to see if the injunction needed a hearing. He thereafter set the hearing for the injunction to May 21, 1997. Judge Merz did not provide any disclosure information to Petitioner on his involvement with Respondents.

At the injunction hearing, Petitioner testified that Respondents, prior to their attempt to take his grade, had not provided him any hearing, that the total number of class sessions was about fifty classes and that he had only missed three classes. Petitioner also established through examination of Shaw that she never kept the attendance herself and that she did not know whether Petitioner was in class on some of those dates. She testified that on certain dates she had asked two other students for confirmation.

She named Beverly Fowler and Sharon Diamant. However, that evidence was inadmissible as to what they told her. Those named students were not in court. Although the Respondents have control over those students they were never called to testify in court. (Appeals Tr. 70-90). Both parties agreed Petitioner missed the first week of school, which consisted of three absences. No professor in his other classes is pursuing any violation of attendance against him. Shaw also testified under oath that she was under mandate by state-bar accreditation rule to enforce the punishment. She also admitted she had not tried to enforce the rule in this fashion to any one

before. However, Petitioner presented and submitted into record evidence showing several whites have missed more than 15% of classes before in various classes, including some caught signing in for others not present, without their grades being taken.

Respondent UDSL was aware of those cases but did not act under the mandate to take the white students' grades and in the case of those caught for fraud, did not dismiss any of them. (Doc. 10). During the hearing, to Petitioner's amazement Judge Merz was leading Respondents by the way he framed questions to them. (Appeals Tr. 40-41).

The next day, after the hearing and after going through the documents Respondents presented in the hearing the day earlier, Petitioner found discrepancies in Respondents' documents and their testimony at the hearing. For example, Shaw testified to 36 class sessions in court and filed a defaced class schedule showing 39 sessions. Upon examination of a genuine class schedule, it showed 49 class sessions. Petitioner filed a motion to strike with exhibits on May 22, 1997, next day after the hearing, early in the morning. (Doc. 15). Same day Judge Merz issued his order denying Petitioner's motion for injunctive relief. (Doc. 14). He denied the motion to strike next day May 23, 1997. (Doc. --).

Petitioner filed a motion to vacate or to reconsider asking the judge to present it to a district judge. (Doc. 16.) It was followed by an amended motion to vacate again requesting the presentation to a district judge. (Doc. 18).

Judge Merz denied it same day. (Doc. 17). These predisposed and predetermined answers and conclusions by Judge Merz raises serious doubt as to his impartiality. In the findings in the order denying Petitioner's motion for injunctive relief, the Judge claims to have taken judicial notices at the hearing. (Doc. 14). Judicial notices when taken properly should be done during the proceedings either at the court's own motion or by the parties on record. However, no party called the attention of the court to any judicial notice at the hearing and the court did not move for one. On these bases, Judge Merz rejected all factual evidence presented by Petitioner and adopted Respondents' argument finding and concluding that petitioner could not succeed under any of his federal claims and thereby denied injunctive relief.

In the meantime Respondents refused to produce documents and resisted discovery. Respondents soon after moved to dismiss. (Doc. 24). Apparent that serious breach of rule of law is taking place, Petitioner filed a sworn motion with affidavit demanding disclosure from the judge, objecting to the motion to dismiss, presenting Respondents discovery stalling tactics and asking that the judge refrain from any further adjudication on the case. (Doc. 28). Judge Merz called a telephone conference, asking Petitioner to file a motion to compel discovery if Respondents are not forthcoming. The judge, for the first time, in response to the Motion to disclose, provided his resume showing he has been an adjunct professor for the Respondents since 1979 and still is. As an adjunct he had helped raise fund and made a pledge for the new building now in progress. At the time of the hearing he still works as an adjunct at the school. (Doc. 29)

However, Judge Merz declined to disqualify himself claiming Petitioner should have known he teaches at UDSL. (Doc. 29). He demanded that Petitioner file the motion to compel if he wanted to get his discovery going, and upon the facts now known to file motion to recuse if he feels so strongly about it. Petitioner declined to file a motion to compel before Judge Merz in the light that it might be taken as consent to further adjudication, but filed a sworn and verified motion to recuse the judge. (Doc. 34). Judge Merz denied the motion and requested vacation of order of reference instead. (Doc. 37). Plaintiff filed a response and objection to Judge Merz's order, requesting he should be disqualified. (Doc. 39). Finally, Judge Dlott disqualified Judge Merz from the case. (Doc. 39).

However, while expecting further instruction, disclosure, and notices from Judge Dlott, the judge converted the motion to dismiss to motion for summary judgment and granted a decision for the Respondents. In the decision Judge Dlott adopted and relied entirely on the tainted findings and conclusions of the disqualified Judge Merz. (App. 4). Petitioner filed a motion to vacate presenting to Judge Dlott that the ruling was improper and constituted a prejudicial surprise and violation of due process. (Doc. 42). The motion was denied. Petitioner appealed. The district court's decision was upheld by the appeals court quoting, restating and resting on the same tainted findings from the disqualified judge. Petitioner files a motion for rehearing en banc. (App. 22). The motion for rehearing was denied. (App. E).

REASONS FOR GRANTING THE PETITION

Judicial integrity is the bedrock of the rule of law. You cannot have one without first having the other. In the case at hand, the magistrate judge, who rendered the tainted and biased findings and judgment that other judges adopted and anchored their decisions on, not only have actual and intimate extra judicial facts of the case; he also has pecuniary interests and shared a "common reputation" as a current and active colleague and employee of the defending parties. The issue of judicial integrity is of enormous importance to the nation and to all judges who understand the great sacrifice the position calls for.

In *Liteky v. U.S.*, 510 U.S. 540, 114 S.Ct. 1147 (1994), in the opinion delivered by Justice Scalia, this Court explains the "Extrajudicial Source" doctrine which mandates recusal under 28 U.S.C. § 455. *Liteky* at 554-555, 1157. This Court held that "the extrajudicial source doctrine, as we have described it, applies to § 455(a). As the Court described it, it is not much of a doctrine but an "extrajudicial source" factor as a limitation under 28 U.S.C. § 455(a). *Id.* This Court draws its reasoning from an earlier decision rendered in *Berger v. United States*, 255 U.S. 22, 31, 41 S.Ct. 230, 232 (1921). Whereupon it based its extrajudicial source factor explained, for the first time, in *United States v. Grinnell Corp.*, 384 U.S. 563, 86 S.Ct. 1698 (1966).

In the *Liteky* decision however, this Court left open the discussion of the consequences of the extrajudicial source factor. It states "It would be better to speak of the

existence of a significant (and often determinative) 'extrajudicial source' factor than of an extrajudicial source doctrine, in recusal jurisprudence. *Liteky* at 554, 555, 1157. The Court submitted." The factors of the present case do not require us to describe the consequences of that factor in complete detail. *Id.*

The facts of this case present the Court with the opportunity to prescribe the consequences of extrajudicial source factor where it was prejudicial and biased. A magistrate judge who works for, and is a colleague of Respondents, tried this case from the bench. He was at the time of the hearing and the decisions in this case, also a fund raiser for the Respondents. However, the judge withheld the information from Petitioner.

Petitioner, after discovery of these facts, moved for recusal. The Judge denied the motion. He filed additional motion for recusal and objection which was followed by district Judge Dlott disqualifying the magistrate. However, without vacatur and ordering a new trial or scheduling a new proceeding or other notices, the new judge relying on and adopting the magistrate Judge's tainted findings and decisions granted summary judgment to the Respondents.

Petitioner properly filed a motion to vacate to the district court judge. The motion was denied. Petitioner filed an appeal raising again the issues that after disqualification of the magistrate judge, without vacatur, and a new trial, or further proceedings, or notices, the abrupt dismissal of Petitioner's cause violates Due Process as established by this Court in *Berger; Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 108 S.Ct. 2194

(1988). However, the appeals court erred and affirmed the lower court's ruling. The opportunity to correct the errors was presented to the court of appeals, therefore all conditions necessary prior to appeal to this court were met.

The magistrate was recused pursuant to 28 U.S.C. § 455(a) and/or § 455(b)(1) and/or § 455(b)(4) and/or § 455(b)(5) herein, after which, district Judge Dlott removed the magistrate. (App. 20).

Petitioner relies on *Liteky v. U.S.*, 510 U.S. 540, 114 S.Ct. 1147 (1994); *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 108 S.Ct. 2194 (1988), for grounds of recusal. Petitioner agrees with the district court that the grounds were met and therefore the magistrate judge was properly recused. In the concurring opinion filed by Justice Kennedy, joined by Justice Blackmun, Justice Stevens and Justice Souter, in *Liteky*, the justices pointed out an important issue as well. In the opinion, *Liteky* at 558, 1158, Justice Kennedy recommends that instead of emphasizing the source of the disqualifying partiality, which was not referenced in the statute. That, since one of the very objects of law is the impartiality of its judges in fact and appearance. The central inquiry under 28 U.S.C. § 455(a) should be the appearance of partiality not where it originated or how it was disclosed, citing, *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 108 S.Ct. 2194 (1988).

Justice Kennedy concluded the standard that ought to be adopted for all allegations of an apparent fixed predisposition, extrajudicial or otherwise, follows from the state itself. *Liteky*, at 564, 1164. Disqualification is

required if an objective observer would entertain reasonable questions about the judge's impartiality. *Id.* If a judge's attitude or state of mind leads a detached observer to conclude that a fair and impartial hearing is unlikely, the judge must be disqualified. Indeed in such circumstances, I should think that any judge who understands the judicial office and oath would be the first to insist that another judge hear the case. *Id.*

The opinion reemphasized the holding in *Liljeberg* stating that there were important differences between subsections (a) and (b) and concluded that the explicit knowledge requirement under § 455(b)(4) does not apply to disqualification motions filed under § 455(a). *Liteky*, at 566, 1162. The Justices pointed out that contrary to what is now held in *Liteky*, as extrajudicial source factor limitation on § 455(a), the various provisions of § 455(b) do not, by their own force, govern § 455(a) as well. Justice Kennedy pointed out that it is obvious from the face of the statutes itself. *Id.* Quoting from the language of the statute Section 455(b) commences with the charge that a judge "shall also disqualify himself in the following circumstances," indicating that the Congress' inclusion of the word "also" shows that subsections (a) and (b) have independent force. *Id.*

However, the district court and the court of appeals erred by not vacating the decisions of the disqualified magistrate judge. Relying on *Liljeberg*, at 848, 2194, this court held that vacatur was the appropriate remedy in these circumstances referring to a § 455(a) violation. The dissent, led by Chief Justice Rehnquist, with whom Justice White and Justice Scalia joined, it appears were not much at odd with the remedy of vacatur under § 455 –

rather it was repelled by allowing it under Rule 60(b) *Liljeberg* at 873. Justice O'Connor, on the other hand, prefers to let the court below decide the appropriate remedy. Relying on *Liljeberg*, even accepting the reasoning of the dissents, Petitioner is entitled to vacatur from the ruling of the disqualified judge under § 455.

The courts below, in adopting the tainted ruling of the disqualified judge and granting summary judgment without notice, runs afoul of due process under the authority of *Haines v. Kerner*, 404 U.S. 519, 520, 92 S.Ct. 594, reh'g denied, 405 U.S. 948 (1972); *Celotex Corp v. Catrett*, 477 U.S. 317, 322 (1986); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 657 (1950); *Hewitt v. Helms*, 459 U.S. 460, 103 S.Ct. 864 (1983); *Berger v. United States*, 255 U.S. 22, 31, 41 S.Ct. 230, 232 (1921); *United States v. Grinnell Corp.*, 384 U.S. 563, 86 S.Ct. 1698 (1966).

If this court finds that the courts below erred by not considering and granting vacatur, or new trial after recusal, it follows that the courts below could not have reasonably concluded that there is no possibility of success on any of the federal claims alleged by Pro-se Petitioner in his pleading. It could reasonably be concluded also that the courts below could not have decided the way it did following the decisions of the recused judge. Whom on the basis of a partial and limited injunction hearing decided Petitioner could not succeed on any of his claims at trial.

In order to conduct the inquiry under 42 U.S.C. § 1981 and 42 U.S.C. § 1983, under color of law, a real hearing or adequate discovery would have to have taken place. In that case, relying on the test enumerated under

West v. Atkins, 487 U.S. 42, 49 (1988); *Lugar v. Edmonson Oil Co.*, Respondents' actual or pretext that they were mandated by state bar accreditation rule to enforce the punishment, could render them liable under the state compulsion test and/or the nexus test being a law school under the control of the State Supreme Court. Likewise, the position of the Respondents, as a federally funded school requires them to follow federal law and to assure due process in circumstances such as here, where they deprive Petitioner of his property interests. Furthermore, evidence of several white students missing more classes than 15% with Respondents looking the other way while blacks in the same situation were punished and deprived of their property rights, could suffice as grounds for violations of the civil rights statutes.

At the least, a proper hearing and a fair trial is necessary to litigate the issues involved.

CONCLUSION

This case presents serious due process and judicial integrity issues concerning millions of Americans on a daily basis. It goes toward reassurance of public confidence in the judiciary and the rule of law. Petitioner respectfully requests this court grant Certiorari to review the issues.

Respectfully submitted,

GANY MIKE BELLO
(Pro-se Petitioner)
4200 S. Hulen, Suite 600
Fort Worth, TX 76109
Tel: (817) 732-4858

APPENDIX A

No. 98-3459

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GANY MIKE BELLO,
Plaintiff-Appellant,
v.
LORI SHAW;
UNIVERSITY OF
DAYTON, School of Law,
Defendants-Appellees.

ORDER

(Filed June 17, 1999)

Before: MARTIN, Chief Judge; JONES and SUHRHEINRICH, Circuit Judges.

Gany Mike Bello, an Ohio litigant proceeding pro se, appeals a district court order dismissing his civil rights action filed pursuant to 42 U.S.C. §§ 1981 and 1983. This case has been referred to a panel of the court pursuant to Rule 34(j)(1), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

Bello, an African-American law student at the University of Dayton Law School ("the Law School"), brought this action against one of his law school professors, Lori Shaw ("Shaw"), and the Law School. Bello alleged that defendant Shaw and the Law School discriminated against him based on his race. Essentially, he contended that defendant Shaw discriminated against him when she enforced her attendance policy by giving Bello a failing grade in her Legal Profession II course. Bello

also asserted two state law claims: a contractual claim for breach of duty, and a claim of fraudulent misrepresentation. The district court granted the defendants' motion for summary judgment after concluding that Bello failed to produce sufficient evidence of racial discrimination under § 1981 and concluding that the Law School's attendance policy and the disciplinary action against Bello did not amount to state action for purposes of § 1983. This timely appeal followed.

Upon review, we conclude that the district court properly granted summary judgment for the defendants as there is no genuine issue of material fact and the defendants are entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). No reasonable jury could find that Bello's failing grade was the result of racial discrimination by either defendant Shaw or the Law School, or that the stated reason for the discipline, *i.e.*, a violation of the attendance policy, was pretextual. *See Odom v. Columbia Univ.*, 906 F. Supp. 188, 194 (S.D.N.Y. 1995) (dismissing student's § 1981 claim for failure to provide evidence beyond "naked assertions" in the complaint of racial discrimination). Thus, Bello's § 1981 claim is without merit. Further, the Law School's attendance policy and the disciplinary action against Bello do not amount to state action for purposes of § 1983. *Flagg Bros. v. Brooks*, 436 U.S. 149, 155-57 (1978); *Ellison v. Garbarino*, 48 F.3d 192, 194 (6th Cir. 1995). Even if the defendants' actions amounted to state action, Bello's § 1983 claim fails for the reasons expressed above – there is simply no evidence for a jury to find the defendants' actions inflicted a constitutional injury upon Bello. The defendants'

acts were consistent with an objective, reasonable attendance policy of which Bello was well aware.

Because the district court properly dismissed all of Bello's federal claims, the court did not abuse its discretion in declining to exercise supplemental jurisdiction over his state law claims as well. *See* 28 U.S.C. § 1367(c)(3); *Landefeld v. Marion Gen. Hosp., Inc.*, 994 F.2d 1178, 1182 (6th Cir. 1993).

Finally, contrary to his contentions, Bello's status as a pro se plaintiff does not entitle him to any special treatment from the federal courts. *Brock v. Hendershott*, 840 F.2d 339, 342-43 (6th Cir. 1988) (non-prisoner, pro se parties are to receive same treatment as parties represented by counsel).

Accordingly, the motion for an injunction pending this appeal is denied as moot, and the district court's order is affirmed. Rule 34(j)(2)(C), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Clerk

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

GANY MIKE BELLO,	:	**Case No. C-3-97-170**
Plaintiff,	:	**District Judge**
	:	**Susan J. Dlott**
v.	:	
	:	**ORDER GRANTING**
LORI SHAW and	:	**DEFENDANTS' MOTION**
UNIVERSITY OF	:	**FOR SUMMARY**
DAYTON,	:	**JUDGMENT**
Defendants.	:	
	:	(Filed Mar. 31, 1998)

This matter is before the Court on Defendants' Motion to Dismiss or Motion for Summary Judgment (doc. #24). Since both parties have submitted materials outside the pleadings, the Court will treat the Motion as a Motion for Summary Judgment. For the reasons more fully stated below, Defendants' Motion is hereby **GRANTED**.

I. PROCEDURAL BACKGROUND

Plaintiff Gany Mile Bello ("Plaintiff" or "Bello") brings this action against one of his law school professors, Lori Shaw ("Defendant" or "Professor Shaw") and The University of Dayton Law School ("Defendant" or "the Law School"). Plaintiff asserts claims under two federal statutes, 42 U.S.C. § 1981 and 42 U.S.C. § 1983, alleging that Professor Shaw and the Law School discriminated against him based on his race. Essentially, Plaintiff contends that Professor Shaw discriminated against him

when she enforced her attendance policy by giving him a failing grade in her Legal Profession II course. Plaintiff also asserts two state law claims: a contractual claim for breach of duty, and a claim of fraudulent misrepresentation.

Plaintiff previously sought a preliminary injunction to prevent Professor Shaw from grading his remaining papers and to prevent the Law School from giving him a failing grade in Legal Profession II. After a preliminary injunction hearing held on May 21, 1997, Magistrate Michael R. Merz issued an order denying the motion for an injunction. In the order, Magistrate Merz concluded that Plaintiff was unlikely to succeed on the merits of any of his claims.

II. FACTUAL BACKGROUND

Gany Mike Bellow is an African-American law student at the University of Dayton Law School. He was a first-year law student in the 1996-97 academic year. The University of Dayton is a private Catholic university which receives some federal funding in the form of student financial aid. During his first semester, Bellow was enrolled in Legal Profession I, a required course taught by Professor Shaw. Bello, along with the other students in Legal Profession I, was enrolled in Professor Shaw's Legal Profession II course during the second semester.

A. The Attendance Policy

The Law School maintains a written attendance policy which is found in both the Law School Policy Manual and the Student Handbook:

> b. *Attendance*
>
> (1) *Required* – Students are required to attend classes regularly. Unless otherwise stated at the beginning of the course, a student missing more than fifteen percent of the class sessions for any reason (including participation in law school sponsored events) will be considered to have failed to attend classes regularly. [ABA Standard 305(c), October 2, 1974, and September 12, 1978.]
>
> (2) *Sanctions* – Faculty members are responsible for insuring that students regularly attend his or her classes. [ABA Standard 305 and October 2, 1974]. To this end, a faculty member may disqualify a student from taking the final examination, drop him or her from the class roll, or reduce his or her grade by one or more increments including giving an "F" for failing to attend classes regularly. A faculty member may adopt a more stringent policy by giving oral or written notice of his or her policy to the class at its beginning. [September 12, 1978]. A written warning is required before imposing any penalty. [October 2, 1974].

The University of Dayton School of Law, Student Handbook, at C-10. Thus, the Law School's attendance policy establishes a general rule that students may not miss more than fifteen percent of classes. Further, the policy

gives faculty the discretion to set a more stringent attendance policy and to choose the appropriate sanction for a violation of the policy.

For her Legal Profession I and Legal Profession II courses, Professor Shaw created and distributed her own attendance policy. This policy was contained in the syllabus for Legal Profession I and the course supplement for Legal Profession II, both of which were distributed to each student on the first day of class. Professor Shaw's policy states:

> Barring extraordinary circumstances, you are expected to attend and participate in all class meetings. Failing to attend class at least six times will result in a failing grade for the course.

According to Professor Shaw's affidavit, student attendance is particularly important in the Legal Profession class since students practice skills under professional supervision. Students in the Legal Profession courses are graded on written assignments, and no final exam is given.

Professor Shaw takes attendance by distributing a sign-in sheet at the start of each class. Professor Shaw's teaching assistant collects the sheets and records the attendance data through the use of a computer program. The evidence reveals that Bellow was absent from Legal Profession II ten times. No other student missed more than five classes.

B. Bello's Absences from Class

The second semester for first-year students began on Monday, January 13, 1997. Bellow was not present for the first class meeting on January 13, and thus did not receive the syllabus on that date. He also missed two class meetings on January 15 and two more on January 17; each day there was a required lecture as well as a required lab. Bello admits that he did not attend any classes for the first week of second semester, but contends that he was never informed of changes in the schedule of class meetings for that week. Although Bello's contention is not entirely clear, he appears to argue that three additional classes per week were added to the class schedule for the first few weeks of the semester. Bello states in his affidavit that he phoned Dean Roboski of the Law School to explain the reason for his absence during the first week of school, but it is unclear from the record why Bellow was absent.

Bellow returned to class on Tuesday, January 21,[1] and he met with Professor Shaw. Professor Shaw reminded Bello of the attendance policy and noted that he had missed five classes the previous week. Professor Shaw warned Bello that a student missing six classes would fail the course, barring extenuating circumstances such as illness. She reduced this warning to writing on January 23. Professor Shaw intended to delivery the written warning to Bello on January 24, but was unable to do so because he was absent from class on that day. She

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[1] This was the first class of the week due to the observance of the Martin Luther King, Jr. holiday on Monday, January 20.

decided not to enforce the penalty of a failing grade against him since he had not received the written warning. The written warning was delivered to Bello on the next day of class, January 27. Bello was again absent, for the seventh time, on March 10. Professor Shaw then prepared a letter on March 12 in which she informed Bello that she was enforcing the attendance policy by giving him a failing grade for Legal Profession II. Bello continued to attend class throughout the semester, but again missed class on March 24, April 16, and April 23, each time without offering any excuse either before or after the missed class.

III. THE MOTION FOR SUMMARY JUDGMENT

A. Legal Standard

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). On a motion for summary judgment, the movant has the burden of showing that there exists no genuine issue of material fact, and the evidence, together with all inferences that can permissibly be drawn therefrom, must be read in the light most favorable to the party opposing the motion. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

Summary judgment is not appropriate if the dispute about a material fact is genuine; "that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S.

242, 248 (1986). Summary judgment is appropriate, however, if the opposing party fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

B. Defendants' Motion

Defendants seek summary judgment on all of Plaintiff's claims. First, with regard to Plaintiff's claim under 42 U.S.C. § 1981, Defendants argue that summary judgment is appropriate because Bello has not produced any evidence of racial discrimination by either Professor Shaw or the Law School. Regarding Plaintiff's claim under 42 U.S.C. § 1983, Defendants contend that none of the alleged acts occurred under "color of state law" as required by the statute, and thus summary judgment should be granted.

As discussed below, the Court agrees that Plaintiff has produced insufficient evidence of racial discrimination to survive summary judgment. Although Plaintiff's Complaint and his Memorandum in Opposition to Summary Judgment include strong assertions that Professor Shaw and the Law School maliciously and intentionally discriminated against him because of his race, Bello has failed to support these allegations with probative evidence of racial animus. Thus, summary judgment must be granted as to Plaintiff's federal claims. *See Mitchell v. Toledo Hospital*, 964 F.2d 577, 582 (6th Cir. 1992) (stating that summary judgment is appropriate where the plaintiff is "unable to produce sufficient evidence beyond the bare

allegations of the complaint to support an essential element of his or her case").

1. Bello's § 1981 Claim

Bello's first claim arises under 42 U.S.C. § 1981, which provides:

> **Equal Rights Under the Law**
>
> **(a) Statement of Equal Rights**
>
> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.
>
> **(b) "Make and enforce contracts" defined**
>
> For purposes of this section, the term, "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.
>
> **(c) Protection against impairment**
>
> The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

42 U.S.C. § 1981. The statute extends to private conduct as well as state action. The Court will assume that a matriculated law student's relationship with his law school is contractual, and that an African-American law student has an enforceable right under § 1981 not to be subject to racial discrimination in the performance of the contract. In order to prevail under § 1981, a plaintiff must demonstrate that the defendants *intentionally* discriminated against him on the basis of race. *Murray v. Thistledown Racing Club, Inc.*, 770 F.2d 63 (6th Cir. 1985).

Bello claims that Professor Shaw's enforcement of the attendance policy against him was racially motivated. In support of this charge, he points to the fact that Professor Shaw counted his five absences during the first week of school against him.[2] He states that Professor Shaw exhibited her bias against him when she "intimidated and psychologically abused" him in class and intentionally graded his classwork lower than other students. Bello also claims that the Law School discriminated against him by failing to reverse Professor Shaw's discriminatory disciplinary action. As a result of the Defendants' actions, Bello asserts that he has suffered or may suffer severe damages, such as: being placed on academic probation;

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[2] Plaintiff apparently believes that Professor Shaw was engaged in a long-term campaign against him. He states: "Upon arriving in class the second week Prof. Shaw now sees her chance to get Plaintiff for good, by failing him in her class and out of law school, she proceeded to enforce an attendance rule policy pursuant to ABA, state bar and other rules and regulations on Plaintiff, counting the classes he missed the first week of school . . . " Plaintiff's Response to Defendants' Motion for Summary Judgment, at 6.

losing his academic scholarship; suffering severe emotional distress; and possibly being expelled from the Law School.

However, Bello has simply failed to present sufficient evidence that any disciplinary or other action by Defendants was motivated by discriminatory intent. In order to support an inference of discrimination in discipline, a plaintiff must show that similarly situated individuals received different treatment. *Stotts v. Memphis Fire Dep't*, 858 F.2d 289 (6th Cir. 1988); *Mitchell v. Toledo Hospital*, 964 F.2d 577, 583 (6th Cir. 1992). Yet Bello has failed to show that Professor Shaw ever imposed a lesser discipline on any student for a violation of the attendance policy. In fact, the record reveals that other students, regardless of race, were given the same written warning which Bello received, but that Bello was the only student to exceed five absences in Legal Profession II. There is simply no evidence that Professor Shaw has not consistently applied the same attendance rules to all of her students. Furthermore, Bello does not allege that Professor Shaw ever made any discriminatory comments to or about him. To the contrary, Professor Shaw made efforts to warn Bello of the consequences of violating the attendance policy, and then she declined to enforce the failing grade upon his sixth absence because he had not received written notice.

Similarly, there is no support for the claim that the Law School acted in a discriminatory fashion. Pursuant to the informal appeal process for attendance policy violations, Associate Dean Richard Perna reviewed Bello's complaint about the failing grade. He found that Professor Shaw had not abused her discretion in enforcing

the objective attendance policy, and therefore did not overturn her decision. There is no evidence that the Law School intentionally discriminated against Bello by giving him a failing grade after Bello violated an objective attendance policy of which he had adequate notice.[3] In sum, no reasonable jury could find that Bello's failing grade was the result of racial discrimination by either Professor Shaw or the Law School, or that the stated reason for the discipline, a violation of the attendance policy, was pretextual. *See Odom v. Columbia University*, 906 F.Supp. 188, 194 (S.D.N.Y. 1995) (dismissing student's § 1981 claim for failure to provide evidence beyond "naked assertions" in the complaint of racial discrimination).

2. Bello's § 1983 Claim

Bello also asserts that the Defendants' actions violated his equal protection and due process rights[4] in

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[3] Plaintiff asserts that the number of classes in the Legal Profession II course is in dispute, and therefore it is unclear whether he violated the attendance policy. Professor Shaw's attendance policy for the course, which was issued pursuant to the Law School policy, dictated that a failing grade would result if a student missed six classes. Bello missed ten classes. Even under the general law school policy, Bello's absences exceeded the maximum of fifteen percent since there were thirty-six mandatory class sessions for the course. Plaintiff contends there were in fact forty-nine classes, but he provides no support for this assertion. However, even if there were forty-nine classes, the Court notes that Bello's ten absences exceed the allowable limit.

[4] Plaintiff's Complaint refers only to due process and equal protection rights, but his brief in opposition to summary judgment appears to add a claim relating to freedom of speech

violation of 42 U.S.C. § 1983. This statute states in relevant part:

> **Civil Action for deprivation of rights**
>
> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .

42 U.S.C. § 1983. A § 1983 claim must satisfy two elements: 1) the deprivation of a federal right, and 2) that this deprivation was caused by a person acting under color of state law. *Ellison v. Garbarino*, 48 F.3d 192, 194 (6th Cir. 1995). Defendants argue that Plaintiff's § 1983 claim fails because there is a lack of state action in this case. The University of Dayton is a private Catholic university. Although Defendants acknowledge that the Law School receives some federal funds in the form of student aid, Defendants contend that the attendance policy and its enforcement against Bello were in no way mandated by

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under the First Amendment. Plaintiff does not clearly explain the basis for a First Amendment violation, but he seems to allege that the Defendants retaliated against Plaintiff's unspecified comments in a racially discriminatory manner. It is immaterial whether the Court considers the First Amendment claim to have been properly raised. The First Amendment claim fails for the same reasons that Plaintiff's due process and equal protection claims fail: 1) absence of state action, and 2) a lack of evidence of improper or discriminatory conduct.

the state. Thus, Defendants contend that none of the actions at issue in this case rise to the level of state involvement required under § 1983. Plaintiff argues that the attendance policy amounted to state action because it was promulgated pursuant to the ABA and the state bar.

There are three tests for determining whether private conduct is fairly attributable to the state for purposes of § 1983 liability: the public function test, the state compulsion test, and the nexus test. *Ellison*, 48 F.3d at 195. The public function test "requires that the private entity exercise powers which are traditionally exclusively reserved to the state." *Wolotsky v. Huhn*, 960 F.2d 1331, 1335 (6th Cir. 1992). Typical examples are running elections or eminent domain. *Ellison*, 48 F.3d at 195. The state compulsion test requires proof that the state significantly encouraged or coerced the private party, either overtly or covertly, to take a particular action such that the decision is really that of the state. *Id.* Finally, the nexus test requires a significantly close relationship between the state and the private actor so that the action taken may be attributed to the state. *Id.* The state must be intimately involved in the challenged conduct for the conduct to be treated as state action.

Under these standards, this Court finds that the Law School's attendance policy and the disciplinary action against Bello do not amount to state action for purposes of § 1983. Although Bello asserts in his brief that the attendance policy was promulgated pursuant to a rule of the state bar, there is no evidence to support this assertion. In fact, the record reveals that although the policy is consistent with ABA standards, it is not required by the Ohio Supreme Court. Thus, the Defendants' actions fail to

constitute state action under the state compulsion test. Similarly, Plaintiff fails to establish any state action under the other two tests, since there is no evidence that any state function or state actor was involved in this case. *See Albert v. Carovano,* 851 F.2d 561, 570 (2nd Cir. 1988) (finding no state action in college's disciplinary action and stating that "even if the state had specifically required (contrary to the undisputed evidence) Hamilton to adopt the precise rules . . . the ultimate power to select a particular sanction in individual cases would . . . rest with the private party."); *Blackburn v. Fisk University,* 443 F.2d 121 (6th Cir. 1971); *McKeesport Hospital v. Accreditation Council for Graduate Medical Education,* 24 F.3d 519 (3rd Cir. 1994); *Krohn v. Harvard Law School,* 552 F.2d 21 (1st Cir. 1977).

Finally, the Court notes that even if Defendants' actions amounted to state action, Plaintiff's § 1983 claim would still fail to survive summary judgment. For the reasons expressed above, there is simply insufficient evidence for a jury to find that Defendants' actions inflicted a constitutional injury upon Bello. Defendants' acts were consistent with an objective, reasonable attendance policy of which Bello was well aware.

3. Bello's State Law Claims

The only remaining claims by Plaintiff are state law claims. Since the Court has granted summary judgment on the federal claims, the Court hereby declines to exercise supplemental jurisdiction over Plaintiff's state law claims. These claims are hereby dismissed without prejudice. 28 U.S.C. § 1367(c)(3); *Wolotsky,* 960 F.2d at 1338.

IV. CONCLUSION

For the reasons set forth above, Defendants' Motion for Summary Judgment is hereby **GRANTED.**

IT IS SO ORDERED.

/s/ Susan J. Dlott
Susan J. Dlott
United States District Judge

Date: March 30, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

GANY MIKE BELLO, Plaintiff(s)	:	
v.	:	Case No. C-3-97-170
LORI SHAW and UNIVERSITY OF DAYTON, Defendant(s)	:	District Judge Susan J. Dlott

JUDGMENT IN A CIVIL CASE

(Filed Mar. 31, 1998)

Decision by Court: This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

. . . Defendant's Motion for Summary Judgment is hereby GRANTED.

March 31, 1998

Kenneth Murphy, Clerk

/s/ Vicki L. Penley
Vicki L. Penley
Deputy Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

GANY MIKE BELLO,	:	
Plaintiff	:	Case No. C-3-97-170
v.	:	District Judge
PROFESSOR LORI SHAW, et al,	:	Susan J. Dlott
Defendants	:	

ORDER

The order of consent to United States Magistrate Judge Michael R. Merz (Doc. 8) is hereby set aside and this matter shall proceed before the undersigned.

IT IS SO ORDERED.

/s/ Susan J. Dlott
Susan J. Dlott
United States District Judge

Date: September 9, 1997

APPENDIX D

98-3459

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GANY MIKE BELLO, Plaintiff-Appellant,	)	
v.	)	ORDER
LORI SHAW, ET AL., Defendants-Appellees.	)	(Filed Sep. 07, 1999)

BEFORE: MARTIN, Chief Judge; JONES and SUHRHEINRICH, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER
OF THE COURT
/s/ Leonard Green
Leonard Green, Clerk

APPENDIX E

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
SITTING IN CINCINNATI OHIO

(Filed June 30, 1999)

COURT OF APPEALS NO. 98-3459
DISTRICT COURT NO. C-97-170

GANY MIKE BELLO
Appellant

vs.

UNIVERSITY OF DAYTON AND LORI SHAW
Appellees

MOTION FOR REHEARING EN-BANC

APPELLANT'S MOTION FOR REHEARING EN-BANC

Gany Mike Bello (Pro-Se Plaintiff)
P.O. Box 20486
Dayton, Oh 45420
(817) 732-4858
APPELLANT Pro-Se

REQUIRED STATEMENTS FOR

REHEARING EN BANC (Rule 14 of the 6th Cir.)

I Appellant, Gany Mike Bello appearing pro-se, expressed a belief, based on reasoned and studied professional judgment, that the panel decision is contrary to the Following decisions of the United States Court of Appeals for the Sixth Circuit in, *Dayco Corp v. Goodyear*

Tire & Rubber Co., 523 F.2d 389 (6th Cir. 1985), *Briggs v. Ohio Election Com'n*, 61 F.3d 487 (6th Cir. 1995). It also conflicts with the Supreme Court of the United States decisions in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 657 (1950); *Walker v. Hutchinson*, 352 U.S. 112, 115, 77 S.Ct. 200, 202 (1962); *Haines v. Kerner*, 404 U.S. 519, 520, 92 S.Ct. 594, rehrg denied, 405 U.S. 948 (1972); and that consideration by the full Court is necessary to secure and maintain uniformity of decisions.

I express a belief, based on a reasoned and studied professional judgment, that this appeal involves one or more questions of exceptional jurisprudence importance:

Questions of judicial integrity and the dispensation of justice;

Rudiments of due process and the Rule of law.

/s/ Mike Bello
Gany Mike Bello (Pro-Se Plaintiff)
P.O. Box 20486
Dayton, Oh 45420
(817) 732-4858
APPELLANT Pro-Se

The decision of the three panel of this Court (herein attached as En Banc Exhibit 1) filed June 17, 1999, and marked not recommended for full text publication, is an erroneous rendition of the significant issues in the case, therefore it is a substitution of personal opinions for a decision in the case, and is not based on the rule of law. The decision was not based on fact argued or presented into evidence and record of this case.

The decision opened with, "Gany Mike Bello, an Ohio litigant proceeding pro se, appeals a district court order dismissing his civil rights action filed pursuant to 42 USC §§ 1981 and 1983." These statements, were not only erroneous they, were unfounded, and does not flow from the facts and evidence in the record of this case. (Doc. 1); (Appellant's brief), Appellant is a citizen of Texas and that of the United States. The second paragraph of the decision summarized the issues of the appeal as, "Essentially, he contended that defendant Shaw discriminated against him when she enforced her attendance policy by giving Bello a failing grade in her Legal Profession II course." It could not be have been a summary of the issues in the case.

The issues presented to the Court of Appeals are as follows: (Appellant's brief, at I)

1. Whether Due Process, as applied by the Courts to Pro-Se granting access and fair and reasonable opportunity to have a meaningful hearing requires, that prior to a judgment on Rule 12(b)(6) and or Rule 56 motion for Defendants filed eight months (8 months) earlier, and before the Magistrate Judge was removed by the district judge from the case on a motion to recuse, and before discovery schedule was had, notice should have been issued by the new judge informing the Pro-se litigant of the necessary procedure and burden requirements, including time schedule to file a response and notice of conversion to a Rule 56 motion.

2. Whether summary judgment was proper when pro-se plaintiff had filed objections to Defendants motions properly presenting to the court the Defendants intentional delay and stonewalling of discovery and judicial partiality and when the District Judge removed the magistrate judge from case over six

months (6 months) earlier, but did not resolve the issue of stonewalling of discovery where the requested documents are vital and necessary for Plaintiff to properly proof his case and did not issue any notice to Plaintiff indicating need to respond to the motion filed with the recused judge, but suddenly rendered decision for the defendant thereby ambushed Plaintiff by surprise and prejudiced his constitutionally protected interests.

3. Whether deprivation of property right and interest by an institution applying attendance policy as punishment pursuant to an ABA administrative Rule to take away property interest in the form of a passing class grade and credit already earned constitute state action under 42 U.S.C. § 1981 and 42 U.S.C. 1983, when such Rule was arbitrarily applied to blacks and minorities as opposed to whites under similar circumstances.

Supplemental issue

Additional issue of judicial interpretation of the Federal Rules of Civil Procedure, Rule 27(b) whether the district court has jurisdiction to entertain deposition under the rule, an issue of first impression in this circuit. These are the issues presented before this Court, however, the issues were not addressed in the opinion of June 17, 1999.

It appears a little unclear, what the decision really addressed. However, since the issues raised by Appellant are issues of law, it is incumbent upon the Court to affirm, distinct [sic] or overrule the authorities it had established which covers the underlying facts in this case. It is law of this jurisdiction that when a district judge converts a 12(b)(6) or motion to dismiss into a motion for summary judgment (Doc 40. Page 1), a notice must be

given to the nonmovant, prior to a decision, *Dayco Corp. v. Goodyear Tire & Rubber Co.*, 523 F.2d 389 (6th Cir. 1985), *Briggs v. Ohio Election Com'n*, 61 F.3d 487 (6th Cir. 1995); *Griffith v. Wainwright*, 772 F.2d 882 (11th Cir. 1985); (App. Br. at 2-3); (Doc 40. Page 1).

The first impression issue of whether where there is judicial impropriety and the magistrate judge with conflict of interest and economic benefit in the defendants, and without disclosure, presided over the case, should the rulings be reviewed in view of a challenge to its credibility was never examined.

Furthermore, where the partial judge was removed, should the new judge rule on an objection to the motion to dismiss, which raised the issue of discovery stonewalling (Doc 28), on discovery requests of material and necessary evidence for the Plaintiff to properly resist the motion, prior to dismissing the case on a motion to dismiss filed by the defendant before the objection and before the partial judge and before scheduled discovery conference.

In *Lavado v. Keohane*, 992 F.2d 601 (6th Cir. 1993) this Court held that where necessity of discovery exist summary judgment is precluded (App.Br at 5).

The Court have held that due process demands that adequate notice reasonably calculated to inform parties of proceedings which may adversely affect their legally protected rights must be given, or else, the right to a hearing is meaningless. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 657 (1950); *Walker v. Hutchinson*, 352 U.S. 112, 115, 77 S.Ct. 200, 202 (1962);

Haines v. Kerner, 404 U.S. 519, 520, 92 S.Ct. 594, rehrg denied, 405 U.S. 948 (1972). (App. Br. at 5-6).

The decision of June 17, merely rested on the ruling of judge Merz without ever reviewing Plaintiffs petition (Doc 1.), and his brief (App. Br, at 7), where in addition to the statutory claims under 42 USC §1981, § 1983, he alleges constitutional violations, including taking of his property without due process and arbitrary and capricious application of a rule in violation of a contractual duty and in violation of the equal protection clause. While district court and the decisions were repeating the statements of Defendants-Appellees verbatim, they ignore the rule for summary judgment Rule 56, which stipulate that the facts in the record be construed in the light most favorable to the non-movant *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The non-movant is the Plaintiff-Appellant and not the Defendants.

The evidence and facts in the record are, that the defendants claimed they were enforcing a rule that students cannot miss more than 15% of class sessions, and that he has missed 10 classes. (Doc 4); (Doc 10); (App. Br xiv-xv). Defendants never accorded Appellant a hearing to determine the facts, even though Appellant denied he missed ten classes and challenged 6 absences as 15% of 49 class sessions; white students similarly situated were never punished. (Tr. 70-90); (Appellant's motion for injunction pending appeal, at 9).

These issues are material issues. It goes to the core of the lawfulness or unlawfulness of the authority to take a

person's grade, as in this case, being, pursued by the defendants.

It has been argued, and well documented, by Realist Jurists that sometimes judges have to make up their mind based on some other external factors, or hunch, and make a ruling finding some authority to support it. J.C. Hutcheson, Jr., The *Judgment Intuitive; The Function of the "hunch" in Judicial decision*, 14 Cornell Law Quarterly 274, 275 (1929). Judge Hutcheson, the Chief Justice of the Fifth Circuit, from 1948 to 1959, cautioned, however, that the jural consequences lies in whether the decision flows from the facts. Id.

Compare, Oliver Wendell Holmes Jr. who argues that the profession of the law is about prediction, but cautioned that the prediction should be founded on body of reports, statutes and precedence, which he called the oracles of the law. O. W. Holmes, *The Path of The Law*, (10 Harv. L. Rev. 457 (1897). He declared, in his dissent in *Lochner v. New York*, 198 US 45, 76, 25 S.Ct. 539, 564 (1905), that decisions on the constitutional rights should be guided by the traditions of our people and our law. Id.

The issues at the center of the controversy conflict with the beliefs in our tradition, the American tradition of hard work and values. The foundation of our democracy as a people living under the rule of Law, and where no one is above the law lend to our respect for the law. These rudiments form the cradle upon which as Americans we work hard at what we do. While knowing, or believing that our courts, without fear or favors, and our law, are there to protect that which we had legitimately worked for.

CONCLUSION

For the reasons and grounds stated above, Appellant prays that the Court grants his request for Rehearing En Banc and that the decision of June 17, 1999, be set aside and the decisions of the district court be reversed and the case sent back for a real trial.

WHEREFORE ALL PREMISES CONSIDERED, Appellant prays that the Court grants his request for Rehearing En Banc and that the decision of June 17, 1999, be set aside and the decisions of the district court be reversed and the case sent back for a real trial on the merits of this case and to grant Appellant all and any other relief that this Court deems he is entitled.

Dated June 29th 1999

/s/ Mike Bello
Gany Mike Bello
(Appellant pro-se)
P.O. Box 20486
Dayton Oh 45420
Telephone no. (817) 732 4858

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing instrument has been served upon the Appellees through their attorney of record Mr Jonathan Holinsworth, at Pottter Wright Morris & Author One South Main Street, Suite 1600 Dayton Ohio 45402. Today June 29, 1999 via certified US mail.

/s/ Mike Bello
Gany Mike Bello (Pro-se)

APPENDIX F

UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Gany Mike Bello Plaintiff, v. Prof. Lori Shaw 300 College Park Dayton, Ohio 45469 And University of Dayton School of Law 300 College Park Dayton, Ohio 45469 Defendants.	§ § § § § § § § § § § § § §	CIVIL ACTION NO. C-3-97-170 JUDGE WALTER HERBERT RICE JURY TRIAL REQUESTED

Plaintiff alleges:

I.

This Court has jurisdiction of this cause pursuant to 28 U.S.C. §§ 1331 and 1343(3)-(4). The Court has authority to determine Plaintiff's state claims pursuant to its supplemental jurisdiction under 28 U.S.C. § 1367. Plaintiff brings this action pursuant to United States Code of Services 42 U.S.C. § 1981 et seq, 42 U.S.C. 1983 et seq, also known as the Civil Rights act, and for violation of his due process and equal protection right under the Constitution of the United States, and state law for breach of duty, and fraudulent misrepresentation.

II. PARTIES

1. Plaintiff, Gany Mike Bello (Pro-se) is an African American and a citizen of the state of Texas and of the United States of America who now is a student of law at the University of Dayton School of Law and resides at 819 Wilmington ave Dayton, Ohio.

2. Defendant, Professor Lori Shaw is a white female and an associate professor teaching Legal Pro I, and Legal Pro II for the first year of law school at the University of Dayton School of Law, and a citizen of Ohio, of which Plaintiff is one of her students.

3. Defendant, University of Dayton School of Law a unit of University of Dayton, an Ohio entity, which corporate agent for service address is C.T. Corp. System 815 Superior Ave N.E. Cleveland, Ohio 44114, is the employer of Professor Lori Shaw and the party who brought about the interaction between Plaintiff and Defendant Professor Lori Shaw and who allows all the violations complained of to take place and refuses to rectify it or put a stop to it even after being aware of it.

III. Violations OF 42 U.S.C. § 1981

4. Defendant, Lori Shaw since, or on about August 1996 has been the Professor of Legal Pro. I class in which Plaintiff was one of the students, Defendant has constantly degraded, intimidate, and psychologically abuse Plaintiff verbally, stating, that Plaintiff does not know what he supposed to know, that he suffers from attention deficit, and cannot make it past the first semester. Defendant further stated that the grade she gives in her class is

generally reflected in students performance in all other classes. Plaintiff at a point told Defendant to keep her negative statements and references to herself. Plaintiff asked Defendant. Who is she to have such a negative conclusions about him in a few months of interaction? Plaintiff asked her if this is how the other students are treated? Defendant stated that Plaintiff is the only student that does not understand the things that everyone else understood. Defendant obvious bias led her to the determination and willful intent to deprive Plaintiff his rights under the law and to bring about her wishes upon Plaintiff.

5. Plaintiff asked Defendant to provide further information for guidance on future papers. Defendant asked Plaintiff to put in more effort if he wants to pass her class, Plaintiff doubled his effort in her class, but instead the grading got lower and lower the highest grade received by Plaintiff in Defendant's class was a C+, and was received on the first paper he wrote in the class. Plaintiff believes that he was intentionally disparately graded lower to be used as a scape goat for other minorities who may try to express their opinion. Plaintiff alleges upon information and beliefs that such intimidation and negative degrading actions, punishment or strict standard were not applied equally to the white students. Plaintiff finished Legal Pro. I with a C- grade and such grade was not reflected in any other classes he took that semester.

6. Continuing with malice, willful and intentional act, to make a scape goat out of Plaintiff and to inflict substantial disparate negative result upon him, Defendant proceeds to enforce an inapplicable rule to the Plaintiff, to bring about the result she had attempted in Legal Pro. I in

the fall of 1996, which was to flunk out the Plaintiff from law school. At the beginning of the semester for spring of 1997, in spite of lack of proper and adequate notice to Plaintiff and the fact that the added classes she introduced at the beginning of the semester were not scheduled classes as contained on the registration card and the fact that the fifteen percent of class sessions after the change, is not the same as fifteen percent of registration scheduled class, Defendant proceeded to enforce the misapplied rule to achieve her goal to fail the Plaintiff.

7. These acts were initiated not to only fail Plaintiff from the class, but to fail Plaintiff in his puisuit of the goal and benefit to become a lawyer. Defendant's application of this severe and harsh punishment were deliberately and reasonablly calculated to deprive Plaintiff of equal right under the law and to inflict punishment upon his person and property that is unlike any ever meted out by Defendant to white members of the class under the same circumstances.

8. Plaintiff approached the department head, associate dean and the dean of the law school to inform them of the wrongful acts, and to ask to be transfered from Defendant, Prof. Lori Shaw's class but the school ignored his complaint.

IV. VIOLATIONS OF 42 U.S.C. § 1983

9. Plaintiff realleges and repleads ¶ 1 thru 8 of his claim.

10. Defendants, Prof. Lori Shaw and University of Dayton School of Law, under color or regulations and laws of

the A.B.A., University of Dayton and other statutes proceeded to deprive Plaintiff of his rights and immunities under the Constitution of the United States by disparate treatment and taking of his property per se, that is class already worked and paid for and earned without due process of the law.

11. Plaintiff alleges that the appeal process that the school claims to have in existence, for review of students injury is a sham, or a pretext at least. Plaintiff alleges on his beliefs and informations that no wrongful acts by any faculty member has ever rightly and consistently been overruled.

12. Plaintiff started the process to avoid Defendant Prof. Lori Shaw from continuing her malicious intent by bringing these issues to the attention of the school, but the school did not take any action to relief the damages. Consequently, Prof. Shaw has embarked on an alternative plot to grade Plaintiff class work down to an "F" in case her application of the rule in determined to be inapplicable.

13. Defendants use of this rule in the manner and under the circumstances is arbitrary and capricious and was for the purpose, to punish and deprive Plaintiff of his rights, privileges and immunities secured by the Constitution and Laws of the United States.

14. Plaintiff alleges that the Defendants under color of regulations, statutes, custom, or usage subjected Plaintiff to deprivation of rights, privileges and immunities secured by the Constitution and laws of the United States.

V. BREACH OF DUTY

15. Plaintiff realleges ¶ 1 through 14.

16. Plaintiff alleges that Defendants, as his school and Professor whom as, he is under, their guardianship and contractual obligation, owes him a duty of care and due diligence, that the school and Professor breached that duty by negatively impacting him by wrongful misapplication of the rules meant to enhance his benefit.

17. Defendants breached their duty of due diligence by recklessly puting in place a process to damage Plaintiff, that is, the rules to fail students without adequately installing an efficient and effective checks and balances to protect the interest of the students for quick and equitable redress and to safeguard students from abusive use of the rule against them.

18. Defendants intentionaly breached their duty of care with regard to the purpose to which they decided to impose a rule that they knew was inaplicable to the Plaintiff or by which application Plaintiff's rights under the law will be violated.

19. As a result of the breach Plaintiff has suffered damages to his person as well as pecuniary losses.

VI. FRAUDULENT MISREPRESENTATION

20. Plaintiff realleges ¶ 1 through 19.

21. Defendant, University of Dayton School of law represented through its Mission Statement and letters to the Plaintiff that it promotes a Judeo-Christain environment

of good faculty members with high moral duties to promote the wellbeing of its students. Instead, through its demonstration towards Plaintiff its mission has nothing to do with the Judeo-Christain promotion of the wellbeing of its students nor the Judeo-Christain environment of faculty member with high moral duties to promote the wellbeing of its students and integrity of the individual, but rather it is to protect status quo and the hierachy of faculty solidarity.

22. Plaintiff was led to belief this representation and as a result relied on it that the school and its faculty will not jeopardize his goal and objective of being a good attorney, and graduating in good standing from the law school, but is not faced with the detriments of such reliance.

23. Defendants misrepresentation is fraudulently concealed, because on the face of it, it appears sincere until you became a victim of an error, as in the case of the Plaintiff experiences alleged above then you realize that they are not motivated to act for the good of your wellbeing.

24. As a result of this misrepresentation Plaintiff has suffered damages.

VII. PRAYER FOR RELIEF

WHEREFORE Plaintiff prays that this Court:

1. Pending the final disposition of this case, grant a temporary restraining order, enjoining the Defendant Prof. Lori Shaw from grading any of the last two papers of the Plaintiff due in Legal Pro. II class for the Spring semester of 1997, and for the

Defendant University of Dayton to appoint another Professor who is unbias against Plaintiff to grade them.

2. Enter a preliminary and permanent injunction, enjoining the Defendants and their agents from enforcing the punishment meted out by Prof. Shaw to give Plaintiff an "F" in the Legal Pro. II course, and all other persons in active concert and participation with them, from reducing the benefits and immunities confered on citizens of the United States by its Constitution and Laws.

3. Order the Defendants, Prof. Lori Shaw and University of Dayton School of Law to pay Plaintiff the cost of this action, and reasonable attorney fees in case the help of an attorney becomes necessary, and other actual and compensatory damages allowed under the law.

4. Order the Defendants, Prof. Lori Shaw and the University of Dayton School of Law to pay punitive damages high enough to deter Defendants from pursuing similar acts in the future.

5. Order such other relief as the Court may deem just and proper.

RESPECTFULLY SUBMITTED
/s/ Mike Bello
(Pro Se Plaintiff) Gany Mike Bello
819 Wilmington Ave #14
Dayton, Ohio 45420
Tel #(513) 298 6731.